A **TAN BOON LEE**

v.

TAN BOON HUAT & ORS

B HIGH COURT MALAYA, IPOH
CHE MOHD RUZIMA GHAZALI JC
[CIVIL SUIT NO: 22 NCVC-83-2011]
11 SEPTEMBER 2014

C ***CIVIL PROCEDURE:*** *Affidavits - Defective affidavits - Allegation that plaintiff repeatedly deposed false residential address - Whether plaintiff had intention to deceive court - Whether affidavits deposed defective - Allegation that plaintiff was illiterate and could not understand Bahasa Malaysia - Whether language used by person who explained* D *contents of affidavits stated in jurat - Discretion of court to allow defective affidavits - Rules of Court 2012, O. 1A, O 2 rr. 1(1), (2) and O. 41 r. 4*

CIVIL PROCEDURE: *Committal proceedings - Application for -* E *Allegation that plaintiff repeatedly deposed false residential address - Whether plaintiff had intention to deceive court - Whether affidavits deposed defective - Whether abuse of court process - Rules of Court 2012, O. 52 r. 4*

This was an application pursuant to leave order granted to the F first, second and third defendants ('the applicants') in encls. 105 and 108 for committal proceedings under O. 52 r. 4 of the Rules of Court 2012 ('ROC') against the plaintiff which was predicated on the plaintiff's action of repeatedly deposing in the affidavits affirmed of his residential address despite knowing the same to be G false or untrue. The applicants alleged that (i) by deposing false statements, the plaintiff had deceived the court, undermined or interfered with the due administration of justice and misused or abused the court's process; and (ii) since the plaintiff was illiterate and could not understand Bahasa Malaysia, the language used by H the person who explained the contents of the affidavits must be stated in the jurat. Hence, the applicants further raised the preliminary issue on a point of law that the affidavits filed by the plaintiff ought to be disregarded as they were defective. In objecting the *ex parte* leave order granted to the applicants, the I plaintiff argued *vide* encl. 126 that, *inter alia*, it was not prejudicial to the applicants or misleading to the court since the plaintiff's address was not part of the material facts or information for the court to decide in the proceedings.

Held (dismissing encls. 105, 108 and 126):

(1) The preliminary issue was dismissed. By virtue of O. 1A, O. 2 rr. 1(1) and (2) and O. 41 r. 4 of the ROC, the court is allowed to consider the defective affidavits. Even if those affidavits were defective, the court should exercise its discretion to allow the plaintiff to use the affidavits in the contempt proceedings due to the serious implication faced by the plaintiff. (para 4)

(2) The plaintiff was given full knowledge of what charge he was facing so as to enable him to meet the charge. There was no valid reason to set aside the leave order and therefore, the plaintiff's application under encl. 126 was dismissed. (para 6)

(3) The applicants failed to prove beyond reasonable doubt that the plaintiff had committed an offence of contempt of court. The applicants failed to prove that the plaintiff had deliberately or intentionally used the said address to obstruct or interfere with the administration of justice. The difficulty faced by the applicants would only be the inability to personally serve the plaintiff the bankruptcy papers to compel payment of cost awarded to the applicants. It did not, in any way, show that the hardship caused have in fact impeded or prejudiced the administration of justice. (para 15)

(4) The applicants and the plaintiff are brothers. The applicants knew exactly where the plaintiff resides since they were all neighbours and their houses were located side by side. Hence, effecting service would not really be a problem. Therefore, the ground used to prove that the plaintiff tried to avoid or evade service of cause papers relating to court proceedings was questionable and was not proven beyond reasonable doubt. (para 17)

Case(s) referred to:

Balakerisnan Varathan & Anor v. Muniandy Varathan & Anor [2005] 3 CLJ 327 HC ***(refd)***

Chiltern District Council v. Keane [1985] 2 All ER 118 ***(refd)***

Dhananjay Sharma v. State of Haryana [1995] 3 SCC 757 ***(refd)***

Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors [2007] 9 CLJ 373 HC ***(refd)***

Han Euu Tiam v. Phang Kui Fatt & Ors [1999] 4 CLJ 395 HC ***(refd)***

Lim Hun Giap & Satu Lagi lwn. Mok Chee Wai & Yang Lain [2001] 7 CLJ 208 HC ***(refd)***

McIlraith v. Grady [1968] 1 QB 468 ***(refd)***
Murray & Co v. Ashok KR Newatia And Another [2000] 2 SCC 367 ***(refd)***
Murray Hiebert v. Chandra Sri Ram [1999] 4 CLJ 65 CA ***(refd)***
Court on its Own Motion v. Gulshan Bajwa [2007] 141 DLT 111 ***(refd)***
Re B (JA) (An Infant) [1965] 1 Ch 1112 ***(refd)***
Re Bramblevale Ltd [1970] 1 Ch 128 ***(refd)***
Re Zainur Zakaria [1999] 3 CLJ 696 HC ***(refd)***
Sharma Kumari Oam Parkash v. PP [2000] 1 LNS 123 HC ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 1A, O. 2 rr. 1(1), (2), O. 41 r. 4, O. 52 rr. 3(2), 4

For the appellants - Nasema Jalaludheen; M/s Cheah Teh & Su
For the respondents - Yusof Zainal Abiden (Lim Kon Keen & Zulaikha Fardi with him; M/s Salehuddin Saidin & Assocs

Reported by Najib Tamby

JUDGMENT

Che Mohd Ruzima Ghazali JC:

Introduction

[1] This is an application pursuant to the leave order given to the first, second and third defendants (the applicants) on 4 September 2013 *vide* the notice of application dated 10 July 2013 (encl. 105) and the notice to show cause dated 10 July 2013 (encl. 108) for committal proceeding pursuant to O. 52 r. 4 of the Rules of Court 2012 against the plaintiff which is predicated on the plaintiff's action of repeatedly deposing in the affidavits affirmed that his residential address is No. 17, Tingkat Meru Valley 2, Taman Peranginan Lembah Meru, 30020 Jelapang, Ipoh despite knowing the same to be false or untrue. The applicants alleged that by deposing false statements the plaintiff has deceived the court, undermined or interfered with the due administration of justice and misused or abused the court's process. The plaintiff has perverted the course of justice and has committed an act of contempt and the applicants argued that a custodial sentence is the only appropriate sentence to be imposed.

[2] The plaintiff applied to set aside the *ex parte* leave order granted to the applicants *vide* the application encl. 126 on the grounds that from the facts given, the applicants failed to show that they had a *prima facie* case against the plaintiff, had no *locus standi* to depend on the affidavits as the basis of the application for contempt and it is not prejudicial to the applicants or misleading the court since the plaintiff's address is not part of the material facts or information for the court to decide in the proceedings.

Preliminarily Point Of Law

[3] The applicants' counsel had raised the preliminary issue on a point of law regarding all the affidavits filed by the plaintiff in support of encl. 126 and to oppose encls. 105 and 108. Those affidavits ought to be disregarded as they are defective. Since the plaintiff alleges that he is illiterate and cannot understand Bahasa Melayu, the language used by the person who explained the contents of the affidavits must be stated in the jurat. Failure to do so is fatal and the affidavits are defective (the case of *Han Euu Tiam v. Phang Kui Fatt & Ors* [1999] 4 CLJ 395; [1999] 4 MLJ 683 and *Lim Hun Giap & Satu Lagi lwn. Mok Chee Wai & Yang Lain* [2001] 7 CLJ 208; [2001] 6 MLJ 450 were referred).

[4] Upon perusing the affidavits filed by the plaintiff in this contempt proceedings, I found out that all the affidavits except one were affirmed with a jurat stating that it was read and explained to the deponent by Lim Kon Keen, his own solicitor. Only one affidavit was affirmed with jurat attended by Zulaikha, who is also one of the plaintiff's solicitor. I am of the opinion that the plaintiff's affidavits affirmed in attendance of Lim Kon Keen were regular since it was read and explained by his own solicitor who is also a Chinese and would be in a better position to explain the contents of the affidavits. I only disregard the affidavit affirmed in attendance of Zulaikha. Even though she is one of the plaintiff's solicitor, she is a Malay and it was not stated in what language she had read and explained the affidavit to the plaintiff in the jurat. I would also like to refer to O. 1A, O. 2 rr. 1(1) and (2) and O. 41 r. 4 of the Rules of Court 2012 which allows the court to consider the defective affidavits. Even, if those affidavit are defective, it is my considered view that the court should exercise its discretion to allow the plaintiff to use the affidavits in the contempt proceedings due to the seriousness of the implication faced by the plaintiff. I dismissed the preliminary issue.

A **Plaintiff's Application To Set Aside The Order For Leave, Encl. 126**

[5] Having decided on the preliminary issue, then I would like to address the plaintiff's application to set aside the *ex parte* leave B order dated 1 July 2013 given to the applicants even though I allowed the parties to submit on all relevant enclosures simultaneously. If the plaintiff succeeded in the application to set aside the leave granted, that is the end of the matter.

C **[6]** Order 52 r. 3(2) of the Rules of Court 2012 provides that:

> Application to Court (O. 52, r. 3)
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> ...
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> (2) An application for such leave must be made *ex parte* to the D Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied E on.

Upon perusing the cause papers filed by the applicants, I am of the opinion that the application was properly filed where all the requirements mentioned in the rules were strictly followed. The application is supported by a statement describing amongst others, F the person sought to be committed and the grounds on which he is alleged to be in contempt. It is also supported by an affidavit verifying the facts relied on, in the statement. The plaintiff was given full knowledge of what charge he is facing so as to enable him to meet the charge. There is no valid reason for me to set G aside the leave order and therefore I dismissed the plaintiff's application under encl. 126.

The Application Encl. 105 And Notice To Show Cause Encl. 108 - Issue

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[7] The sole issue that arises in this application is whether the act of the plaintiff of repeatedly deposing in the affidavits affirmed that his residential address is No. 17, Tingkat Meru Valley 2, Taman Peranginan Lembah Meru, 30020 Jelapang, Ipoh despite I knowing the same to be false or untrue constitutes an act of contempt so as to entitle the applicants to commence committal proceedings against the plaintiff.

The Law

[8] The Federal Court decision in the case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 3 MLJ 458 dealt extensively with the evolution of the law of contempt. The Rt Hon Arifin bin Zakaria CJ in his judgment has detailed out the guiding principle relating to the law of contempt which I totally adopt. I would like to emphasise that the committal proceeding is criminal in nature since it involves the liberty of a person. The observation and the decisions by Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112, Lord Denning MR in *McIlraith v. Grady* [1968] 1 QB 468, Lord Denning MR in another case of *Re Bramblevale Ltd* [1970] 1 Ch 128 and Sir Donaldson MR in *Chiltern District Council v. Keane* [1985] 2 All ER 118 cited by the Rt Hon CJ in the above case remind me to be more careful and thorough in analysing all evidence available in this contempt proceedings. I also keep reminding myself that the burden of proof on the applicants is beyond reasonable doubt. With that in mind, I will now consider the applicants' application.

Analysis And Finding

[9] The background facts of the alleged act of contempt by the plaintiff referred to, are as per para. 6 to para. 19 statement (encl. 97) and verified by the affidavit of Tan Kang Wei (encl. 96A). Briefly, on 7 April 2011, the plaintiff had presented a winding up petition against the tenth defendant. Applicants were the second to fourth respondents in the said petition. The applicants' application to strike out the petition was allowed and awarded costs in the sum of RM200,000. Pursuant to the request by the applicants, the court issued a bankruptcy notice against the plaintiff on 23 November 2012 for payment of the costs. In the main civil suit, the plaintiff had filed encl. 2 dated 18 April 2011, encl. 68 dated 6 April 2012 and encl. 81 dated 12 July 2012. In respect of the aforesaid enclosures the plaintiff averred on oath that his address is No. 17, Tingkat Meru Valley 2, Taman Peranginan Lembah Meru, 30020 Jelapang, Ipoh. In the petition for winding up and in the affidavits deposed and filed in respect of the interlocutory applications the plaintiff stated the same address. (see exh. TKW 3 dated 7 April 2011, exh. TKW 4 dated 14 June 2012, exh. TKW 5 dated 10 July 2012 and exh. TKW 6 dated 2 August 2012 of encl. 96A) Therefore the same address was used in the bankruptcy notice by the applicants. The applicants' solicitors sought to effect personal service of the bankruptcy notice on the plaintiff at the address on 5 December

2012 and found out that the house was occupied by a family of Indian nationality from New Delhi and they have been renting and occupying the house since the last six months.

[10] Based on that, the applicants sought an order for committal on the ground that the plaintiff had committed an offence under the Penal Code for deposing a false statement on oath, deliberately and intentionally deceiving or misleading the court, avoiding or evading service of cause papers relating to court proceedings, obstructing or interfering the administration of justice, abusing the process of court and therefore has committed and is guilty of contempt of court. (The case of *Court on its Own Motion v. Gulshan Bajwa* [2007] 141 DLT 111 (DB); *Dhananjay Sharma v. State of Haryana* [1995] 3 SCC 757; *Murray Hiebert v. Chandra Sri Ram* [1999] 4 CLJ 65; [1999] 4 MLJ 321; *Sharma Kumari Oam Parkash v. PP* [2000] 1 LNS 123; [2000] 6 MLJ 790; *Balakerisnan Varathan & Anor v. Muniandy Varathan & Anor* [2005] 3 CLJ 327; [2005] 5 MLJ 380; *Re Zainur Zakaria* [1999] 3 CLJ 696; [1999] 2 MLJ 577; *Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors* [2007] 9 CLJ 373; [2007] 7 MLJ 250 and *Murray & Co v. Ashok KR. Newatia And Another* [2000] 2 SCC 367 were referred)

[11] In order to succeed, the applicants must prove that the plaintiff had deliberately and intentionally used the said address to impede or prejudice the administration of justice. The burden of proof in a contempt proceedings as stated earlier, must be on the applicants to prove beyond reasonable doubt. From the evidence adduced and the submission submitted by the applicants' counsel, I agree that the applicants have proven beyond reasonable doubt that the plaintiff had affirmed in those affidavits that the address used was not the plaintiff's residential address. That is the plaintiff's action or his *actus reus*. What about the *mens rea*? In a criminal act, the intention or knowledge of wrongdoing that constitutes part of a crime has to be proved.

[12] The one and only evidence adduced by the applicants to show that the intention of the plaintiff to impede or prejudice the administration of justice with regard to plaintiff's address would be the inability of the applicants to personally serve the plaintiff the bankruptcy papers to compel payment of cost awarded to them. There are no other instances or situation where the applicants had complained about any difficulties while dealing with the plaintiff in any other matters because of the said address.

[13] Next, I would like to examine the explanation given by the plaintiff in his affidavit in reply for the contempt proceeding in encl. 123. The plaintiff averred in his affidavit that the address used is the address of his son's house. During the material time the house was occupied by his son and his daughter in law. The plaintiff being an illiterate, he depends on his son and his daughter in law to handle all matters pertaining to his civil litigation because he would not be able to appreciate the nature of legal documents sent to him. To facilitate his son to handle the legal matters he was advised to use the son's house address. His son subsequently moved out from the house in the middle of the month of July 2012 and rented out the house. A copy of rental agreement dated 12 July 2012 was exhibited in the affidavit. Then the plaintiff changed his solicitor a few times and had forgotten about the change of address. The new solicitor kept using the old address because of not being informed by the plaintiff.

[14] The plaintiff's counsel had submitted that the act of using the said address by the plaintiff was not done to impede or prejudice the administration of justice. As for the interlocutory proceedings, there is no evidence or suggestion that the proceeding were impeded or prejudiced because of it. The court was not misled in any way during those proceedings, as the address of plaintiff was not an issue. More importantly the applicants were not prejudiced as the plaintiff's application for amendment of the statement of claim was dismissed by court. Meanwhile, for the winding up petition, the applicants had successfully make an application to dismiss it. The address of the plaintiff was not an issue during the hearing and its use in the application by the plaintiff had not prejudiced the applicants. The order for cost is in relation to the petition for winding up proceedings and has nothing to do with the civil suit before the court. More importantly the cost was duly paid before the application for committal was made. Therefore no prejudice had been caused to the applicants and not in any way obstructing or interfering the administration of justice.

[15] Having heard all the arguments of both parties, upon perusing all the evidence adduced in the affidavits involved in the committal proceedings, I find that the applicants failed to prove beyond reasonable doubt that the plaintiff had committed an offence of contempt of court. The applicants failed to prove that the plaintiff had deliberately or intentionally used the said address

to obstruct or interfere the administration of justice. The difficulty faced by the applicants would only be the inability to personally serve the plaintiff the bankruptcy papers to compel payment of cost awarded to the applicants. It does not in any way shown that the hardship cause have in fact impeded or prejudiced the administration of justice.

[16] Besides that, it is my considered view that the explanations given by the plaintiff in his affidavit in reply encl. 123 as to the reason why he used the said address are acceptable. The explanations given are probable where the usage of the said address was for a reasonable and legitimate purpose. Therefore with the explanation by itself creates a reasonable doubt to the applicants' application to commit the plaintiff for contempt of court.

[17] Finally, I would like to note that the applicants and the plaintiff are brothers. As correctly pointed out by the plaintiff's counsel that all the applicants know exactly where the plaintiff resides. They are all neighbours. Their houses are located side by side. Particulars of first and third applicants and plaintiff in the statement accompanying the application for committal confirmed it. Enclosure 97 paras. 1 and 3 and encl. 134 exh. TBL I showed the photograph of the houses Lots 43579 and 43580. Hence effecting service is not really a problem. Therefore the ground used to prove that the plaintiff try to avoid or evade service of cause papers relating to court proceedings is questionable and was not proven beyond reasonable doubt.

Decision

[18] For the foregoing reasons, I find that the charges of contempt of court preferred against the plaintiff had not been established beyond reasonable doubt. Accordingly, the applicants' application under encl. 105 and encl. 108 are dismissed. As earlier decided, the plaintiff's application under encl. 126 was dismissed. As both applications were dismissed, I made no order as to cost.